KNM GROUP BHD & ANOR v. HITACHI ZOSEN CORPORATION & ORS

HIGH COURT MALAYA, KUALA LUMPUR
SAHERAN SUHENDRAN JC
[ORIGINATING SUMMONS NO: WA-24NCC-201-04-2024]
18 OCTOBER 2025

Abstract – *(i) The role of an independent assessor, pursuant to s. 369B(9) of the Companies Act 2016, is adjudicative and quasi-judicial, rather than merely administrative or procedural. As a scheme of arrangement effectively compromises a creditor's right to pursue claims in court or arbitration, the assessment of a proof of debt must be a robust substitute for those legal forums; (ii) In determining the suitability of an independent assessor, the court must look at the specific nature of the disputed debt. The appointee must possess the specific expertise required to determine the legal rights and liabilities at the heart of the dispute.*

***COMPANY LAW**: Scheme of arrangement – Proof of debt – Appointment of independent assessor – Dispute involving complex legal and construction issues – Application for appointment of independent assessor by court – Criteria for determining suitability of appointee – Whether role of independent assessor adjudicative or merely administrative – Whether legal practitioner or liquidator more suited for role – Companies Act 2016, ss. 366 & 369B(9)*

By way of a purchase order between KNM Process Systems Sdn Bhd ('KNM Process') and Konecranes Material Handling (M) Sdn Bhd ('Konecranes'), Konecranes was engaged to supply and manufacture waste crane systems and two cranes for a total sum of RM4,800,000. It was alleged by Konecranes that KNM Process breached the contract, leading to the issuance of a termination notice. Konecranes demanded RM3,702,963 for unpaid sums and damages and commenced arbitration proceedings. The arbitration was stayed after KNM Process obtained successive restraining orders in connection with proposed schemes of arrangement. Konecranes submitted proofs of debt ('POD') (i) for RM3,802,279.50, but the chairperson admitted only RM518,839; and (ii) for RM4,593,053.96 but the chairperson admitted only RM549,750.27, rejecting the balance of RM4,043,303.69. Konecranes objected to the rejection and requested the appointment of an independent assessor, pursuant to s. 369B(9) of the Companies Act 2016 ('Act'), to adjudicate the dispute. Konecranes proposed Mr Tharminder Singh ('Mr Tharminder') as the proposed independent assessor while KNM Process proposed Deloitte Restructuring Services PLT ('Deloitte'). Konecranes, in turn, suggested a Malaysian-qualified solicitor and invited KNM Process to nominate its own Malaysian-qualified solicitor for further

consideration. Konecranes refused, maintaining its own nomination of Deloitte. As the parties could not agree on the appointee, Konecranes filed the present application for the court to appoint an independent assessor. KNM Process opposed the appointment of Mr Tharminder, arguing that the independent assessor's role was administrative rather than adjudicative and that such an appointment would give rise to a perception of bias.

Held (appointing Mr Tharminder as independent assessor):

(1) As Konecranes would lose its rights to arbitration, the independent assessment process under s. 369B of the Act, being a substitute to arbitration and the courts, must be adjudicative and robust. The role of the chairman, as an adjudicator, is no different from that envisaged for an independent assessor. Section 369B(9), (10) and (11) expressly recognise that the role of the independent assessor is to 'adjudicate'. He therefore assumes the role of a *quasi*-judicial adjudicator. The contention that Mr Tharminder was not a suitable candidate, as his adjudicative skills were ill-suited to the role of an independent assessor, was rejected. (paras 31, 34 & 36)

(2) A mere personal relationship between Mr Prabjit, counsel and solicitor of a party to the dispute, and Mr Tharminder, without more, would not disqualify Mr Tharminder from being appointed as the independent assessor. There was no evidence of a special relationship that would give rise to apparent bias. (para 60)

(3) Mr Tharminder was a legal practitioner, with almost 27 years of experience, with experience in alternative dispute resolution, having conducted complex arbitrations in the International Chamber of Commerce and the Asian International Arbitration Centre ('AIAC'). He held a certificate in adjudication from the AIAC for over ten years and is currently an adjudicator with the AIAC, having acted as adjudicator in construction disputes. Mr Lim and Mr Eddie Goh from Deloitte, on the other hand, both with backgrounds in accounting and restructuring, lacked the requisite legal qualifications and expertise for an independent assessor in the adjudication of this particular dispute. This raised a real doubt about their ability to determine the legal issues raised in the arbitration. Considering the specific nature of Konecranes' POD, the candidate should be a legal practitioner rather than a member of an accounting firm without legal expertise. (paras 61, 70 & 71)

Case(s) referred to:

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***

Evergreat Construction Co Re Ltd v. Presscrete Engineering Re Ltd [2006] 1 SLR 634 ***(refd)***

Fitzpatrick v. Behan [2020] IECA 324 ***(refd)***

Glomac Resources Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Anor [2016] 5 CLJ 590 HC ***(refd)***

KNM Group Bhd & Ors v. Hitachi Zosen Corporation & Ors [2025] CLJU 988 HC ***(refd)***
Lim Tuck Sun v. Celcom (Malaysia) Bhd & Ors [2025] 7 CLJ 227 CA ***(refd)***
Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 2 WLR 870 ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Michael Chow Keat Thye v. Suruhanjaya Sekuriti Malaysia & Anor [2013] 10 CLJ 505 HC ***(refd)***
Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***
R v. Gough [1993] 2 All ER 724 ***(refd)***
Re Lehman Brothers International (Europe) [2018] EWHC 1980 Ch ***(refd)***
Re Noble Group Ltd [2018] EWHC 2911 Ch ***(refd)***
Re Noble Group Ltd (No 2) [2018] EWHC 3092 Ch ***(refd)***
Re Top Builders Capital Bhd & Ors [2021] CLJU 597; [2021] 1 LNS 597 HC ***(refd)***
The Royal Bank Of Scotland NV (Formerly Known As ABN Amro Bank NV) & Ors v. TT International Ltd & Another Appeal [2012] SGCA 9 ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 366(1), (4), 368(1), 369B(5), (9), (10), (11), (12), (13)
Companies Commission of Malaysia Act 2001, s. 20C

For the applicant - Isaac Pereira & Amanda John; M/s Alvin John & Partners
For the respondents - Prabjit Singh; M/s Rahmat Lim & Partners

Reported by Najib Tamby

JUDGMENT

Saheran Suhendran JC:

[1] These grounds concern an appeal against the appointment of an independent assessor ("independent assessor") under s. 369B of the Companies Act 2016 ("CA 2016"). All references to sections are with reference to sections in CA 2016.

[2] The contents of these grounds are as out in the table below:

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Introduction

[3] On the application of the applicants, I granted orders convening meetings ("the scheme meetings") of their scheme creditors ("the scheme creditors") to approve schemes of arrangement proposed by the applicants with their scheme creditors. I also granted *ad-interim* restraining orders, see *KNM Group Bhd & Ors v. Hitachi Zosen Corporation & Ors* [2025] CLJU 988; [2025] MLJU 1234 at paras. 170 and 234.

[4] Once convening orders under s. 366(1) are granted, a proof of debt ("POD") exercise must be undertaken to determine the value of the scheme creditors' debts for voting at the scheme meetings.

[5] By s. 369B(5), the PODs filed by scheme creditors are to be adjudicated by the chairman of the respective scheme meeting. Any dispute between the chairperson and a creditor on the rejection or admission of a POD may be adjudicated by an independent assessor appointed under s. 369B(9), which provides:

> (9) Any dispute between the chairperson and the company, between the chairperson and one or more creditors in relation to the rejection of a proof of debt, or between two or more creditors in relation to the inspection or admission of a proof of debt, may be adjudicated by an Independent Assessor appointed –
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> (a) by the agreement of all parties to the dispute; or
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> (b) if there is no such agreement, by the Court on the application of –
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> (i) any party to the dispute; or
>
> (ii) the company, whether or not a party to the dispute.

[6] A dispute on the independent assessor's decision on the POD is governed by s. 369B(11) to (13), which are considered in brief below.

Background Facts

[7] The contractual relationship between the second applicant ("KNM Process") and Konecranes arose from a contract on the terms of a purchase order dated 21 April 2016 ("the purchase order"), whereby Konecranes was engaged to supply, build and/or manufacture: (i) waste crane systems and two cranes, for RM4,800,000. Disputes arose between the parties.

[8] Konecranes alleges that the cranes had since been ready for delivery. And on 9 April 2019, it issued an invoice to KNM Process or RM480,000 for the third payment pursuant to cl. 6.2.3 of the purchase order.

[9] It is alleged that KNM Process breached the purchase order whereupon Konecranes, by its solicitors, issued a termination notice dated 12 May 2020. KNM Process denied liability. Konecranes then demanded RM3,702,963 being alleged unpaid sums under the purchase order together with losses and damages. KNM Process did not respond.

[10] Pursuant to cl. 22 of the purchase order, Konecranes commenced arbitration proceedings by a notice of arbitration dated 15 November 2021. However, the arbitration was stayed after KNM Process obtained successive restraining orders under s. 368(1) in conjunction with schemes of arrangement proposed by the applicants under s. 366(1) (collectively, "the schemes"). These restraining orders were obtained under three successive originating summonses ("OS1, OS2 and OS3" respectively) and restrained further progress of the arbitration.

[11] Pursuant to OS1 and OS3, POD exercises under s. 369B were carried out.

[12] The first POD exercise was conducted under OS1, with Mr Ho Soo Woon appointed as chairperson. Without prejudice to its position in arbitration, Konecranes submitted its POD for RM3,802,279.50 together with supporting documents.

[13] However, only RM518,839 was recognised.

[14] A second POD exercise was conducted under OS3. On 7 May 2025, Konecranes submitted a POD (again on a without prejudice basis) for RM4,593,053.96 together with supporting documents ("the Koncranes POD").

[15] The chairperson only admitted RM549,750.27, rejecting the balance of RM4,043,303.69.

[16] On 18 July 2025, Konecranes' solicitors issued a letter to KNM Process and the chairperson objecting to the rejection of the balance. It also requested KNM Process to agree to appoint an independent assessor under s. 369B(9) to adjudicate the Konecranes POD, specifically, the rejection of the balance of RM4,043,303.69.

The Nominations

[17] Konecranes nominated Mr Tharminder Singh a/l Ginder Singh ("Mr Tharminder") from Messrs Izral Partnership, as the proposed independent assessor.

[18] By a letter dated 22 July 2025, KNM Process agreed to the appointment of an independent assessor but nominated Deloitte Restructuring Services PLT ("Deloitte") instead. Konecranes, in turn, suggested a Malaysian-qualified solicitor and invited KNM Process to nominate its own Malaysian-qualified solicitor for further consideration. Konecranes refused, maintaining its nomination of Deloitte.

[19] Given the disagreement, Konecranes filed this application under encl. 378 (as amended to encl. 412) for the court to appoint an independent assessor under s. 369B(9)(b).

The Court Appointment

[20] The POD process is governed by s. 369B read together with the Suruhanjaya Syarikat Malaysia's Guidelines dated 1 April 2024 ("SSM Guidelines") issued pursuant to s. 20C of the Companies Commission of Malaysia Act 2001.

[21] Sections 369B(9) and (10) allow opposing creditors to object to the rejection by the chairperson of the whole or part of the creditor's POD. The POD regime allows such dispute to be further adjudicated by an independent assessor appointed either by the agreement of the parties to the dispute; or absent such agreement, by the court on the application by any such party.

[22] In the end, while both parties agreed in principle to the appointment of an independent assessor, Konecranes maintained its choice of a legal practitioner, Mr Tharminder Singh, while KNM Process preferred licensed liquidators, Mr Lim Jit Cheng and Mr Eddie Goh of Deloitte.

[23] A proper assessment of the POD is important because, if KNM scheme is approved, all Konecranes' claims against KNM Process including those in the arbitration, will be compromised and discharged, see para. 8.2 of the explanatory statement dated 9 June 2025 ("ES") at p. 31 of encl. 387. The key to a proper assessment is the appointment of a suitable independent assessor.

[24] The major contentious objections of the parties are those against Mr Tharminder. I will deal with them first.

Objections Against Mr Tharminder

[25] The objections against his appointment are essentially two-fold. First, it is said that the independent assessor does not undertake an adjudicative role and as such, Mr Tharminder's adjudicative skills are ill-suited to the appointment. Secondly, his appointment will give rise to a perception of bias.

Role Not Adjudicative

[26] The applicants submit that the role of the independent assessor is fundamentally administrative and procedural, and not adjudicative, see para. 8 of KNM's affidavit in encl. 393, p. 15. It is argued therefore, that Mr Tharminder would be unsuitable possessing instead, skills akin to an arbitrator.

[27] *Evergreat Construction Co Re Ltd v. Presscrete Engineering Re Ltd* [2006] 1 SLR 634 was cited, where the parties agreed for the appointment of an IA from the construction industry, who would assess the respective claims as an expert rather than as an arbitrator. With respect, this is an agreed position of the parties and not a finding of the court.

[28] On the contrary, at para. 18 of KNM's affidavit in encl. 393, the applicants appear to admit that "Deloitte has been proposed as the global independent assessor to adjudicate all disputed proofs of debt".

[29] In any event, I regret I cannot accept the argument that the scope of the independent assessor is not 'adjudicative'.

[30] The POD process in a scheme of arrangement was considered in *Re Top Builders Capital Bhd & Ors* [2021] 1 CLJU 597; [2021] 1 LNS 597 at paras. 74 and 95. To put matters in context, it is worth quoting what Ong Chee Kwan J (as he then was) said in examining the role of the 'decision maker', whom he regarded as adjudicator of a proof of debt:

> [74] In the process of evaluating the claims, the decision maker may have to make fair estimates of certain claims and if there is little or insufficient materials to form a conclusion as to a value, to ascribe a nil or minimal amount to the claims. Where there is a dispute, the decision maker may either reject the claims or permit the claims, whether in whole or in part. In cases where the claims are contingent claims or unliquidated claims or where the company is seeking a set off or counterclaim, a fair estimate or value will have to be made. In arriving at the determination of the claims in such cases, there will be some exercise of discretion (see *Re UDL Holdings Ltd & Ors* [2000] 4 HKC 778). ...
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> [95] Based on the aforesaid outline of the scheme of arrangement process, it is clear that Parliament has intended by s. 368(1) of the CA for the scheme of arrangement proceedings to serve as the preferred alternative platform for the determination and resolution of the claims by the creditors against the company which, if the scheme is to have any chance of succeeding, must take precedence over the normal legal proceedings filed in court or before an arbitral tribunal. The adjudication of the creditors' claims under the scheme of arrangement is in a summary fashion as opposed to the normal legal proceedings where elaborate investigation into the evidence is conducted for establishing the merits of the claims.

[31] In *Re Noble Group Ltd (No 2)* [2018] EWHC 3092 (Ch) Snowden J (as he then was) following Hildyard J in *Re Lehman Brothers International (Europe)* [2018] EWHC 1980 (Ch) at para. 158, held that the POD process as a substitute for the courts, must be "robust, satisfactory, and justified". Bearing in mind that Konecranes would lose its rights to arbitration (para 8.2 of the ES), I agree the independent assessment process under s. 369B, being a substitute to arbitration and the courts, must be adjudicative and robust.

[32] In *The Royal Bank Of Scotland NV (Formerly Known As ABN Amro Bank NV) & Others v. TT International Ltd & Another Appeal* [2012] SGCA 9, the Court of Appeal of Singapore recognised that the Chairman assumes the role as an adjudicator, at paras. 67 and 102:

> [67] The chairman **then has to perform the *quasi*-judicial task of adjudicating upon disputes as to the voting rights of anyone claiming to be a creditor.** The chairman cannot act capriciously or arbitrarily and must determine issues objectively. His role is akin to that of a **judicial manager** in deciding whether to admit or reject **proofs of debt** lodged with him. ...
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> [102] Thus, the chairman of a s 210 creditors' meeting has three options when assessing a contentious claim for the purpose of voting. First, he might admit the claim wholly. Second, he might reject a claim wholly or partially, in which case he should provide to the creditor written grounds of his rejection. We elaborate on this by stating our view that the chairman's decisions should not be peremptory. His duty to give reasons puts the onus on him to look at each proof more carefully in the proper exercise of his ***quasi*-judicial function.** This requirement also improves the transparency of the voting process (see above at [73]).
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> (emphasis added)

[33] As did Ong J in *Re Top Builders Capital Bhd & Ors* (*supra*) at para. 72:

> [72] In practice, the determination of these claims made in the form of proofs of debt submitted to the company is by the chairman of the creditors' meetings or an appointed scheme manager ('the decision maker'). The decision maker is not an officer of the court in the same way that a liquidator of a company under a winding up order is. Nevertheless, it has been held that the decision maker owes a fiduciary duty to act in good faith and with complete impartiality and assumed a *quasi*-judicial role **when adjudicating the proofs of debt** (see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal* [2012] SGCA 9). (emphasis added)

[34] In my judgment, this role of the chairman as an adjudicator is no different from that envisaged for an independent assessor. Indeed, s. 369B(9), (10) and (11) expressly recognise that the role of the independent assessor is to "adjudicate". He therefore assumes the role of a *quasi*-judicial adjudicator as described in *The Royal Bank of Scotland NV* (*supra*) and *Re Top Builders Capital Bhd & Ors* (*supra*).

[35] In this regard, s. 369B(9), (10) and (11) provide:

> (9) Any dispute between the chairperson and the company, between the chairperson and one or more creditors in relation to the rejection of a proof of debt, or between two or more creditors in relation to the inspection or admission of a proof of debt, may be **adjudicated by an Independent Assessor** appointed ...

A (10) The Independent Assessor appointed under subsection (9) shall be entitled to receive a renumeration which shall be determined -

(a) by the agreement of all the parties to the dispute to be adjudicated by the Independent Assessor, ...

B (11) Where a creditor, the company or the chairperson disagrees with any **decision of an Independent Assessor on an adjudication under subsection (9)** in relation to the inspection, admission or rejection of a proof of debt, the creditor, company or chairperson, as the case may be, may file a notice of disagreement stating the reasons for the disagreement regarding that decision to the Court in the manner as determined by the Registrar not less than seven days before the hearing of the application C under subsection 366(4). (emphasis added)

[36] I therefore reject the contention that Mr Tharminder is not a suitable candidate as his adjudicative skills are ill-suited to the role as an independent assessor.

D *Apparent Bias*

[37] The second allegation is bias. It is plain that in adjudicating PODs in a scheme of arrangement, the adjudicator (whether the chairman or an independent assessor) performs duties akin to those of a liquidator in adjudicating proofs in a winding-up. As such, the adjudicator will be subject E to the same duties as a liquidator, *mutatis mutandis*. For the purposes of this case, I do not see any differences that would warrant the imposition of duties any different from those of a liquidator.

[38] In *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713, the Federal Court at paras. 35 F and 36, found that a liquidator, in adjudicating proofs of debts, acts in a *quasi*-judicial capacity. And with that role, he is duty-bound to act impartially:

[35] In *Re Timberland* (1979) 4 ACLR 259 the *quasi*-judicial standard of G behaviour was applied to a liquidator on adjudicating a proof of debt. The case was explained however in *Re Chevron Furnishers Pty Ltd* (1993) 12 ACSR 565:

That asserted identity between the position of a judge and that of the liquidator was based, on the observation of Marks J in *Commission for Corporate Affairs v. Harvey* [1980] VR 669 at p 696. H

That passage, so the argument went, was approved by a majority of the High Court in *Tanning Research Laboratories Inc v. O'Brien* (1990) 169 CLR 332. But a careful reading of the judgments, particularly that of Brennan and Dawson JJ, establishes a significant limitation thereon. At pp 338-9 their Honours said: In I determining whether to admit or reject a proof of debt, a liquidator has been said to act in a *quasi*-judicial capacity *Re Britton and Millard*

> *Ltd* [1957] 107 LJ 6011 according to standards no less than the standards of a court or judge: *Commission for Corporate Affairs v. Harvey* [1980] VR 669 at p 696. ...
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> [36] That the standards of a judge are not applied to liquidators is put beyond doubt in *Bovis Lend Lease Pty Ltd v. Wily* (2003) 45 ACSR 612 wherein at p 643 it was held:
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> > As can be seen from the passage I have quoted, some cases have emphasised in enunciating the principles of independence and impartiality, that a court-appointed liquidator is an officer of the court. In *Re Timberland Ltd* [1980] VR 669: [1979] 4 ACLR 259. Marks J said that in some respects a liquidator is in the same position as a judge. Thus, a liquidator acts in a *quasi*-judicial capacity in determining whether to admit or reject a proof of debt, and must act according to standards no less than the standards of a court or judge: *Tanning Research Laboratories Inc v. O'Brien* (1990) 169 CLR 332 at pp 338-9, 91ALR 180 at p 184:1 ACSR 510 at p 514 per Brennan and Dawson JJ. It may be that the duties of independence and impartiality are rooted in this curial analogy.

[39] A liquidator having *quasi*-judicial duties, must therefore act in accordance with the standards no less than that of a judge. As the role of the chairman and the independent assessor under s. 369B are also *quasi*-judicial (see paras. 32 to 34 above) they must also act according to the standards of a judge. Their overriding duty is of course, to act impartially and without bias.

[40] As to bias, there are two categories. These are 'actual bias' and 'apparent bias', see *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351 at para. 35.

[41] The allegation here is not that Mr Tharminder is guilty of actual bias, but that his appointment will give rise to a perception of apparent bias sufficient to disqualify his nomination.

[42] The context of this accusation is that Mr Tharminder was nominated by the eighth respondent ("R8"), who along with the second respondent ("R2"), opposes the schemes and advocates liquidation. Both R2 and R8 are adverse to the applicants and are represented by the same firm of solicitors, M/s Rahmat Lim & Partners ("Rahmat Lim").

[43] The crux of the objection is that Mr Prabjit Singh, the solicitor from Rahmat Lim, previously worked at Izral Partnership under the supervision (directly or indirectly) of Mr Tharminder.

[44] The assertion is that this past employer-employee relationship, where Mr Tharminder Singh was a superior of Mr Prabjit, leads to an apprehension of apparent bias, whether due to perceived continued affinity and/or collegial loyalty and/or undue influence, particularly when no disclosure of this relationship was made by R8 and/or Rahmat Lim.

[45] So, it is said, the nomination of Mr Tharminder should not be accepted as it jeopardises the integrity of the scheme process.

Relationship Between Lawyer And Adjudicator

[46] In essence, the complaint is that the previous relationship arises from Mr Tharminder and Mr Prabjit working in the same firm. And as the latter now represents parties (R2 and R8) adverse to the applicants, this gives rise to the perception of apparent bias on the part of Mr Tharminder against the applicants.

The Law And Apparent Bias

[47] The principles are not in dispute.

[48] Actual bias need not be shown; apparent bias is enough. The test for apparent bias was recently restated by the Court of Appeal in *Lim Tuck Sun v. Celcom (Malaysia) Bhd & Ors* [2025] 7 CLJ 227; [2025] 4 MLJ 583 at para. 118:

> [118] In Malaysia, it is trite that the applicable test is 'the real danger of bias' test (see the decision of Edgar Joseph Jr FCJ (as His Lordship then was) at paras 69E to 70B in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1) (*Majlis Perbandaran Pulau Pinang*). In this regard, Lord Goff at para 670F in *Regina v. Gough* [1993] AC 646; [1993] 2 WLR 883 explained:
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> > Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that **he might unfairly regard (or have unfairly regarded) with favour,** or disfavour, the case of a party to the issue under consideration by him ...
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> [119] In adopting the 'real danger of bias' test, the Federal Court had highlighted that the issue of bias has to be answered by looking at all the relevant facts and not only by taking the lens of a hypothetical reasonable man. (emphasis added)

[49] The Court of Appeal noted that the 'real danger of bias' test has been continuously endorsed by the Federal Court in a number of decisions. I accept that the independent assessor must be impartial and that apparent bias is sufficient to vitiate the nomination, regardless of whether actual bias can be proven.

[50] The context here is where the proposed decision-maker has or had a relationship with counsel of one party to the dispute. Particularly when the independent assessor is to act in accordance with the standards of a judge, the obvious applicable analogy is that of a judge with a previous relationship with counsel (or a solicitor) for a litigating party in a dispute adjudicated by that same judge.

[51] The issue of apparent bias in this context where a judge had a previous relationship with lawyers representing a litigating party, was comprehensively dealt with by S Nantha Balan J (as he then was) in *Glomac Resources Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2016] 5 CLJ 590; [2016] 9 MLJ 584. The issue was as stated at para. 6:

> [6] In the context of the test for bias, the question before me is whether a fair minded person, sufficiently apprised of all relevant facts would opine that there was a real danger of bias by reason of the fact that the presiding judge was previously a partner in the same law firm as counsel appearing for one of the parties.

[52] His Lordship applied the 'real danger of bias test' in, amongst other authorities, *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 2 WLR 870; *R v. Gough* [1993] 2 All ER 724 and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1.

[53] His Lordship noted that if the real danger of bias test was satisfied in this situation, it would mean that judges should not hear matters where counsel appearing before them were at one time their colleague in the same law firm. His Lordship stated:

> [27] Of course, all of the above principles or judicial pronouncements are not carved in stone and are rules of general application and there could well be (and indeed there must be) exceptions to these rules and this will in turn depend on the particular facts of each case. But the starting point is that past relationship between the presiding judge and counsel who were previously partners in the same law firm *per se*, is not generally a disqualification or a ground for recusal of the judge.

[54] Indeed, at para. 31, His Lordship held that there may be certain situations where a special relationship developed that may fail the 'real danger of bias test'. But in his case, there was no such evidence.

[55] After referring to *Michael Chow Keat Thye v. Suruhanjaya Sekuriti Malaysia & Anor* [2013] 10 CLJ 505, His Lordship concluded:

> [40] ..., the view that I take is that if the threshold for real danger of bias could not be established in the *Michael Chow's* case, then it follows by parity of reasoning that there cannot be a real danger of bias in the present case where the recusal is predicated merely on the fact that more than a decade ago plaintiff's counsel and I were partners in the same law firm. It might be different if the firm or one of the partners of the firm was before me as a party. As such, I am impelled to the view that the mere fact that counsel for one of the parties was a partner in the same firm together with the presiding judge, does not give rise to a real danger of bias.
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> [41] In the result, based on the principles of law relating to recusals and upon a due consideration of the grounds advanced by the first defendant and the arguments that were presented by counsel, I am of the opinion

A that the mere fact that counsel for the plaintiff and I were at one time (about 13 years ago) partners in the same law firm, does not, without more, establish or give rise to a 'real danger of bias'.

[56] In the Irish decision in *Fitzpatrick v. Behan* [2020] IECA 324, it was held:

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66. ... It is also worth pointing out that in *Orange Communications* the Supreme Court appeared satisfied that *merely* pointing to previous links or associations (*including employment*) was not sufficient to establish objective bias ....

67. As stated in *O'Ceallaigh v. An Bord Altranais and Ors* [2011] IESC 50, C there must be a real and not a mere hypothetical or speculative link between the association under consideration and the apprehension of lack of impartiality being alleged. In a situation where the allegation of bias is made due to the connection on the part of *an advocate with the judge or quasi-judicial officer,* the Supreme Court has held in *Talbot v. Hermitage Golf Club and Ors* [2009] IESC 26 wherein Denham C.J. held:

D

> His submissions and assertions do not establish a basis for intervention, nor do they establish objective bias. Attendance at the same schools by judges and lawyers does not establish objective bias. Having a spouse, who many years before was a member of a law firm which is a respondent in a case, does not E establish objective bias by a judge. Having advised persons as clients previously does not prove objective bias. ...
>
> That case held that the test was whether an ordinary reasonable member of the public would have a reasonable apprehension that an appellant would not have a fair hearing before an impartial F judge. It was pointed out that *barristers* were independent and did not become espoused to a litigant's ambitions in providing the litigant with legal services. The reasonable person would be aware of that. Similarly, a *solicitor* does not espouse his client's ambitions. There must be *additional factors* establishing a cogent and rational link and its capacity to influence.

G

68. From the foregoing, the case law establishes that there is *no automatic bar* on judges hearing cases involving advocates from the *previous firms in which they were employed* (or partners). They may hear cases involving clients for whom they previously acted, subject to the facts establishing a real apprehension of bias based upon extensive knowledge of that client. H Judges may even hear cases in which they acted against one of the parties in other litigation. The appellant has not satisfied this Court that the prior business relationship *of itself*, would establish reasonable bias. *In the present case, the costs accountant was appearing essentially as an advocate in the proceedings.* The mere fact of the previous business relationship does not give rise to a reasonable apprehension of bias. It therefore follows that in I so far as the appellant advances this part of his application on the basis of a *mere business relationship* between Mr. Conlon and the Taxing Master giving rise to an apprehension of bias, this ground of appeal must fail.

(emphasis added)

[57] It is important for solicitors to appreciate the types of relationships that will give rise to apparent bias on the part of a presiding judge so as to give rise to need for recusal. In short, a previous relationship with lawyers representing a litigant in a contested dispute does not *per se* disqualify the presiding judge.

[58] Other examples should be appreciated. In the case of liquidators, previous relationships are similarly viewed. The Federal Court in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713 in relation to conflict of interest, which is not unlike bias, held:

> [25] It is trite that the correct principle with respect to conflict of interest in the case of liquidators are as set out in *McPherson's Law of Company Liquidation* (at para 8.120). The guiding principle is that the liquidator must be independent and be seen to be independent. In other words, there cannot be an actual or apparent conflict. ...
>
> [27] On apparent conflict the correct approach is as set out in *Advance Housing Pty Ltd (in liq) v. Newcastle Classic Development Pty Ltd* (1994) 14 ACSR 230 at p 233:
>
> > In performing his functions the liquidator must both be and appear to be independent and impartial of the creditors; *Re Intercontinental Properties Pty Ltd (in liq)* (1977) 12 ACLR 488 at pp 491-2 after citing from *Re Chevron Furnishers Pty Ltd*, the court held:
> >
> > > ... If the foregoing statement were taken as precluding any association, it being in the circumstance's *obiter*, then even the most limited prior involvement with the company in liquidation could disqualify the relevant firm of accountants from providing one of its partners as liquidator. In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short, the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance.
>
> [28] ... We are of the view the commercial reality is that large accounting practices will give rise to associations with persons whom insolvency practitioners will sell assets to. ...

A [29] Commercial reality dictates that the existence of such relationship by itself should not disqualify liquidators or their audit clients. ... In *Pongrass Group Operations Pty Ltd v Lowerpinems Pty Ltd* (1994) 15 ACSR 341 with respect to the appointment of the liquidators and possible conflict, the court ruled:

B > ... the evidence of relationship between a senior partner of Ferrier Hodgson and the Pongrass family who are associated with creditors of the company does not seem sufficient to impair the capacity of another member of the firm to perform and be seen to perform his duties as liquidator.

C **[59]** A similar approach that mere associations are not enough was also applied to the appointment of receivers. The Federal Court continued:

> [30] Still on the issue of appointment of liquidators and possible conflict in the Canadian case of *Cobrico Development Inc v. Tucker Industries Inc* 2000 ABQB 766 it was held that:
>
> D > With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers, are *often affiliated with chartered accountancy practices which engage in accounting,* audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are
> E regulated professionals who in the course of realisation on assets may be employing the services of experts, or who may be selling assets to persons, any of whom *may have affiliation with the receiver. However, generally that does not constitute a conflict of interest* ...
>
> (emphasis added)

F **[60]** In short, the authorities on other professionals take a similar approach, that a mere relationship is not enough. As such, a mere personal relationship between Mr Prabjit, counsel and solicitor of a party to the dispute and Mr Tharminder, without more, will not disqualify Mr Tharminder from being appointed as the independent assessor. There was no evidence of a
G special relationship that that would give rise to apparent bias.

The Choice Of Assessor

Mr Tharminder Singh

[61] Mr Tharminder is a legal practitioner with almost 27 years of
H experience (see encl. 387, p. 235) with experience in alternative dispute resolution, having conducted complex arbitrations in the ICC and AIAC. He holds a certificate in adjudication from the AIAC for over ten years and is currently an adjudicator with the AIAC, having acted as adjudicator in construction disputes. See, encl. 387 (vol. 9), pp. 225 to 237.

I

[62] Konecranes submitted that Mr Tharminder's qualifications and experience make him better suited to resolve the legal and factual issues raised in the Konecranes POD. In this respect, Deloitte, with no proven legal expertise would have to retain solicitors and brief them on the legal issues. This further delay does not favour the appointment of Deloitte.

[63] Konecranes also submitted that a legal practitioner with expertise in Malaysian law is needed because of the particular circumstances surrounding the Konecranes POD. It consists of 1,529 pages, comprising the arbitration pleadings and supporting documents, which, it is said, raises complex legal arguments and factual considerations.

[64] It was emphasised that an assessment of the Konecranes POD requires an analysis of the parties' rights, involves considering the legal issues and submissions as presented in the arbitration pleadings and in applying the law. Further, the nature of the Konecranes POD would necessitate addressing the following legal issues:

(i) whether KNM Process had breached its obligations under the contract with Konecranes;

(ii) whether KNM Process had failed to fulfil its payment obligations under the contract and to issue the necessary release instructions;

(iii) whether Konecranes validly terminated the contract;

(iv) whether Konecranes has suffered damages, and if so, the quantification of such damages;

(v) whether there are any merits to the defences raised by KNM Process, including frustration of contract; and

(vi) whether Konecranes is entitled to the relief sought.

[65] I accept that these are largely legal issues surrounding the termination of the purchase order and the amounts due thereunder.

Deloitte

[66] The applicants' basis for nominating Deloitte is that it is a globally recognised professional restructuring firm with a proven track record in restructuring, creditor engagement, and financial analysis; and offers greater value and experience.

[67] It was submitted that the proposed joint appointment of two directors of Deloitte is more financially attractive than Mr Tharminder's charges. The cost of the independent assessor is obviously important as the applicants are financially distressed.

[68] I have no doubt as to Deloitte's qualifications. And the applicants submit that that the appointment needs to ensure the assessment is conducted on a commercial and non-legal basis, which is allegedly in line with the court's expectations.

[69] Regrettably, this is a misapprehension. I have no such expectations nor is there a need for the assessment to be conducted on a purely commercial and non-legal basis:

(i) I was reminded that in *Re Noble Group (No. 2)* (*supra*) at para. 8 and see *Re Noble Group Ltd* [2018] EWHC 2911 (Ch) at paras. 8 and 9, the independent adjudicators were senior legal practitioners, either a retired Court of Appeal Judge (Sir Bernard Rix) or a nominated Queens' Counsel (Nicholas Vineall QC); and

(ii) in the restructuring of Sapura Energy Bhd, a retired judge of the Court of Appeal, Tan Sri Ariff Yusoff was appointed as the independent adjudicator.

[70] With all due respect to Mr Lim Jit Cheng and Mr Eddie Goh from Deloitte, based on the available affidavit evidence, they lack the requisite legal qualifications and expertise for an independent assessor in the adjudication of this particular dispute. Both have backgrounds in accounting and restructuring, but there is no evidence suggesting that they possess any legal expertise required in this dispute. This raises a real doubt about their ability to determine the legal issues raised in the arbitration, particularly the issues outlined in para. [63] above. Further, I have little doubt that in assessing the Konecranes POD, Deloitte would have to retain legal counsel which will only delay and add to the costs of the schemes. This would be unnecessary with the appointment of Mr Tharminder.

[71] Considering the specific nature of the Konecranes POD, the candidate should be a legal practitioner, rather than members of an accounting firm without legal expertise.

Conclusion

[72] Accordingly, I granted an order in terms of prayers 1 and 2 of encl. 378 (as amended to encl. 412) appointing Mr Tharminder as the independent assessor pursuant to s. 369B. I deferred prayers 3 and 4 until after completion of the assessment. Prayer 5 is set aside with reservation of rights for submissions on the effect of the adjudication by the independent assessor at the stage of application by the applicants for approval of the scheme of arrangement or compromise pursuant to s. 366(4) of the Companies Act 2016 and no order as to costs.